89-1870

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

JEROME C. UTZ,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding, contrary to the decision of this Court in *McNally v. United States,* 483 U.S. 350 (1987), that a former Deputy Attorney General charged with misconduct in office, *could be convicted of mail fraud if there was no financial harm to any person?*

2. Is the Ninth Circuit's Jury Instruction, 27 F.R.D., page 152, Section 21.09, which was given in the instant case, unconstitutional and contrary to this Court's decision in *McNally v. United States,* supra, in that *the jury was instructed that "financial harm is irrelevant"?*

3. Did the Court of Appeals err in holding that it is not a requisite that a mail fraud *indictment* charge a person with having successfully defrauded a person or persons?

4. Is the Ninth Circuit's holding, that a former Deputy Attorney General charged with misconduct in office, can be convicted of mail fraud *even if no person was defrauded,* contrary to the decisions of other Circuits in the United States decided after *McNally;* Is a decision of this Court necessary to secure or maintain uniformity of it 's decision in *McNally?*

5. Assuming that the Court of Appeals erred as argued hereinabove, should the two convictions for 18 U.S.C. Section 2314 ("Travel Fraud") also be reversed under the holdings of *McNally v. United States,* supra, in that the mail fraud and travel fraud charges in the indictment were indentical and adopted by reference into each other in the pleadings?

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Petitioner Jerome C. Utz respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit entered on September 27, 1989, rehearing denied on March 23, 1990.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 886 F.2d 1148 (9th Cir. 1989) and is printed in Appendix A. The order denying petition for rehearing and for suggestion for rehearing in banc is printed in Appendix B.

JURISDICTION

The opinion of the Court of Appeals was entered on September 27, 1989 (Appx. A). The order denying petition for rehearing and suggestion for rehearing in banc was entered on March 23, 1990 and is printed in Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and all other relevant sections. This petition is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves (Appendix C):

1. Title 18 U.S.C. Section 1341.
2. Title 18 U.S.C. Section 2314.

STATEMENT OF THE CASE

A. Statement of the Facts

1. This case involves the relocation of a Federal Protected Sensitive Witness, David Pedley, aka David Wellington—a mafia informer. After being given a name change by the Federal authorities, Pedley, now Wellington, was relocated to Cameron Park, California.

2. During this time, petitioner was a Deputy Attorney General, State of California and was assigned to the Monterey Task Force, an intelligence organization developing informants against the Mexican Mafia, the Nuestra Famalia, and terrorist organizations such as the SLA. Petitioner had, with the cooperation of the FBI, convinced Dr. Timothy Leary, a Federal Protected Witness to cooperate as an informer against the Weather Underground and provide the name of attorneys and others who had helped him escape from State Prison in California. While interviewing Leary at a Safe house run by Marshal Van Court in the Sacramento area, petitioner was introduced to Pedley by Van Court. Petitioner made the same deal with Pedley that he and the Federal Authorities had made with Leary—if Pedley would help the government identify members of terrorist organizations and prison gangs,

petitioner and the Federal Authorities would help Pedley secure his release from prison and obtain a new identity.

3. During the next few months Pedley gave valuable information to petitioner and the Federal Authorities that identified members of prison gangs and solve an armed robbery (RT 18, 3013; 20-3349-9; 25-4003-4009). To fulfill their part of the bargain, Frank Kiernan, Special attorney, U.S. Department of Justice recommended to the California Parole Department that Pedley be released from custody and paroled to Art Van Court. (RT 20-3351, 3358-65). Petitioner appeared in courts in New Jersey and Los Angeles at the request of Federal Authorities. Petitioner also made a trip to the court in the State of Washington to finalize Pedleys name change to Wellington. The name change had been approved by Federal Authorities and the Federal Authorities had given Pedley a new drivers license and social security card under the name of Wellington. (RT 18-2986, 20-3369-3376, 19-3155-63, 11-2015-2017).

4. While on parole to U.S. Marshal Arthur Van Court, Wellington engaged in a speculative house building project for investors who wanted to take advantage of the housing boom in California. The house building program was approved by the Department of Justice as part of Wellington's protected new identity status. The speculative investors made a down payment of approximately $10,000.00 for Cano Construction (a Corporation owned by Pedley) to build the houses on a lot that was subordinated to construction financing. No construction draws were received until the work had actually been done. (RT 2-263-269-295; 4-737; 6-1185; 10-1768-1779; 6-1231-1233). Lots were purchased, many houses were built, and the construction crew totaled as many as 50 at times. (RT 7-1282-1286, 7-1292-93).

5. Investors made a profit and things were running well in 1977. (RT 1-152, 2-260, 266, 320, 3-393, 402, 403). In October 1977, the bottom fell out of the speculative housing boom in California. The Savings and Loans changed their policy and ruled that no future loans would be approved unless the owners planned to live in the houses. (RT 3-527, 581, 19-3147, 25-4105). Pedley and his corporation filed for voluntary bankruptcy. At the time the entities owned by Pedley had over $1,500,000 in cash. The

disbursable estate was around $2,500,000.00. One piece of property owned by Pedley was sold by the bankruptcy court for $4,000,000.00 in cash. (RT 22-2784-97; 19-3172-73; 20-3295, 26-4182-). The investors named in the indictment were paid off by the bankruptcy court. At the time of trial, there still remained in Pedleys estate the sum of $545,000.00 (RT 31-4763).[1]

6. The alleged victims lost no money or property.

Allan Morrison	Count 1	Made a profit of $6,509.89
G. and D. Beck.....	Count 2	Made profit of $7,500.
S. and J. Farnsworth ...	Count 3	No profit or loss. (Break Even).
Loretta Wright	Count 4	Profit of $7,743.25
John Alexandro.....	Count 5	Profit of $4,836.00
Robert Sampson	Count 6	Profit of $2,000.00
John McKim.....	Count 7	No profit or loss (Break Even).
L. and S. West	Count 8	Profit of $5,321.68.
K. and J. Smith	Count 9	Profit of $8,000.00
Paul Campbell.....	Count 10	Profit of $3,799.00
K. and J. Smith	Count 11	Profit of $8,000.00.

7. Evidence was introduced at the trial that petitioner, at the request of Federal Authorities, made visits to courts in New Jersey and Los Angeles when these courts were considering the Government's request that Pedley be paroled to U.S. Marshall Van Court.

McNally error in the indictment.

The indictment charged petitioner with misuse of his public office as Deputy Attorney General. The indictment alleged that during the course of a scheme and artifice to defraud, petitioner and a relocated Federal Protected Witness by the name of David Wellington (Pedley) "attempted" to devise a scheme and artifice to defraud various persons and institutions (the trial evidence suggested only the Federal Court in New Jersey and the State Courts in Los Angeles and the State of Washington). *The*

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[1] "RT refers to Reporters Transcript filed with the court below. "ER" refers to the Excerpt of Record in the court below.

indictment did not allege that any of the investors lost any money or property. (ER, Exhibit 3—Indictment.[1]

McNally trial error.

1. The trial court denied petitioner's request to introduce additional evidence that the alleged victims lost no money—but actually made a profit (criminal intent). The government's theory adopted by the trial court is summed up as follows;

> "MR. HOFFMAN: FINANCIAL LOSS, OF COURSE, IS INCONSEQUENTIAL THERE DOESN'T HAVE TO BE A LOSS TO BE A FRAUD.
>
> "THE COURT: OKAY. (RT 17-2813, lines 15-17.

McNally error during final argument.

1. During final argument the government argued that it had proved its case by showing that petitioner had gone to a Federal Court in New Jersey, a State Court in Los Angeles, and a State Court in Washington, on Pedley's behalf. (RT 29-4513, 4514, 4515).

McNally error in jury instructions.

1. The jury was instructed using old and pre-**McNally** instructions 27 F.R.D. page 152, Section 21-09 as follows:

> "The gist of the offense charged in the indictment is the willful misuse of the mails in carrying out, or attempting to carry out, a scheme to defraud as charged, and not the scheme itself.
> **So, the success or failure of the scheme is immaterial."** (RT 30-4712, lines 19-23) (Appendix D).

B. Jurisdiction of the District Court and Court of Appeals

Jurisdiction of the District Court is predicated upon the provisions of 18 United States Code, Section 3231. Jurisdiction of the Court of Appeals is based upon the provisions of 28 United States Code, Section 1291.

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[1] "RT refers to Reporters Transcript filed with the court below. "ER" refers to the Excerpt of Record in the court below.

C. The Proceedings Below

On June 3, 1982, one day before the Statute of Limitations ran, a federal grand jury in Sacramento, California returned an eleven count indictment against petitioner and their own Federal Protected Sensitive Witness David Pedley. The indictment charged nine counts of mail fraud in violation of 18 U.S.C. Section 1341 and two counts of fraud in interstate travel in violation of 18 U.S.C. Section 2314. Unknown to petitioner, an altered indictment was prepared by the government and given to the jury after they had begun their deliberations. This altered indictment has never been seen since although the trial judge in the instant proceedings stated in his order that, "The court personally went into the jury room and verified that the jury had the correct version of the indictment." (This violation of jury contact by the trial judge came as a complete surprise not only to petitioner but to the Government). Thereafter, a verdict of guilty was returned against petitioner on nine counts (Seven for mail fraud and two for fraud in interstate travel).

On November 9, 1987, petitioner filed a Title 28, Section 2255 motion with the trial court. On December 10, 1987, petitioner filed a Supplemental Motion based upon this Court's holding in *McNally v. United States,* 107 S.Ct. 2875 (June 24, 1987). On February 5, 1988, petitioner's motion was denied without an evidentiary hearing. Petitioner filed a timely Notice of Appeal on February 11, 1988 and thereafter requested that the matter be heard either as a 2255 Motion or a Petition for a Writ of Error Coram Nobis since it was taking so long to decide the issues raised by *McNally* supra.

On September 27, 1989, the Court of Appeals for the Ninth Circuit, in a published opinion, affirmed the conviction on the issues raised by this petition (Appx A).

On March 23, 1990, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing en banc (Appx. B).

REASONS FOR GRANTING CERTIORARI

This case presents important questions regarding the interpretation and application of this Court's decision in *McNally v. United States,* 107 S.Ct. 2875 (June 24, 1987).

All circuits of the United States except one panel of the Ninth Circuit has interpreted *McNally* to require that a mail fraud indictment must charge a person with having successfully defrauded some person or persons; that the mere attempt to defraud is not enough; and that the jury must be instructed that they must find that some person or person were actually defrauded of money or property by the defendant.

In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded.

In the instant case, the jury was specifically instructed that, "The success or failure of the scheme is immaterial." This was the old Instruction found in 27 F.R.D. page 152 and has been soundly rejected by all circuits after *McNally* supra. After *McNally* all circuits except the Ninth has held that where the jury instructed that "financial harm is irrelevant", the conviction must be reversed since "it is difficult to conceive of an instruction more at odds with *McNally.*" *(United States v. Ochs,* 842 F.2d 515, 525 (Ist Cir 1988).

In holding that the scheme need not financially harm any person of money or property, the Ninth Circuit has decided federal questions in a way in direct conflict with the applicable decisions of this Court and other Court of Appeals.

Only this Court can put to rest the uncertainties created by the opinion of the Ninth Circuit, which has placed itself in direct conflict with other cases on point as demonstrated hereinbelow.

It is important to note that *McNally* error permeated the entire proceeding. First the indictment did not charge a mail fraud or fraud in interstate travel. That is, the indictment did not allege that any person was actually defrauded of money or property.

The government's theory that financial harm was irrelevant prevented petitioner from introducing evidence that the alleged victims actually made a profit. This evidence was relevant on the issue of criminal intent.

The government was permitted to allege and offer evidence concerning petitioner's alleged misuse of public office which was completely outside the mail fraud and fraud in interstate travel statutes.

The government was permitted to argue to the jury that petitioner had misused his office as a Deputy Attorney General and that they had therefore proven their case.

Finally, the jury instruction that, "the success or failure of the scheme is immaterial", explicitly instructed the jury that it was proper to rely solely on the invalid theory of criminal liability. (*United States v. Ochs,* supra at 525).

This Court has granted similar requests for relief under a Petition for a Writ of Certiorari under identical facts and circumstances. Petitioner requests that the convictions be reversed.

I

IN HOLDING THAT *"FINANCIAL HARM IS IRRELEVANT"* IN A MAIL FRAUD CASE, WHERE A DEFENDANT IS CHARGED AND TRIED ON A MISUSE OF PUBLIC OFFICE THEORY, THE NINTH CIRCUIT HAS DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PUT ITSELF IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *McNALLY V. UNITED STATES,* 483 U.S. 350; 97 L. Ed 2d. (1987)

The Ninth Circuit held in it's Opinion that prior to *McNally* it was permissable to establish a violation of the mail fraud statute without requiring the government to prove that the scheme succeeded and that it could find nothing in *McNally* to upset it's interpretation of the statute. (Appx. A, page 3).

The flaw with the Ninth Circuit's Opinion is that the court used only selected pre-*McNally* decisions that have since been overruled by the other Circuits. The Ninth Circuit relies almost

solely on *Erwin v. United States,* 242 F.2d 336, 337 (6th Cir. 1957).

Erwin, however, was explicitely overruled by the Sixth Circuit in 1964—well before the *McNally* decision. The Sixth Circuit held in *United States v. Rabinowitz,* (1964) 327 F.2d 62, at page 76 as follows:

> "In every mail fraud case there must be a scheme to defraud, representations known by defendants to be false **and some persons must have been defrauded** . . . ".

In 1987 when this Court reached it's decision in *McNally v. United States,* 97 L.Ed 2d, it recognized that some confusion still existed in the Circuit Courts concerning the meaning of the words "to defraud". This Court therefore went to great lengths in describing the history of the mail fraud statute and particularly the words "to defraud". This Court held in pertinent part as follows:

> "As the Court long ago stated, however, the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' (*Hammerschmidt v. United States,* 265 US 182, 188, 188, 68 L Ed 968, 44 S Ct 511 (1924)." *McNally,* supra at 301).
>
> . . .
>
> "We note that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property . . . ". *McNally,* supra at 302.
>
> **" 'Although the Government now relies in part on the assertion that petitioner obtained property by means of false representations to Wombell, Brief for United States 20-21, n 17, there was nothing in the jury charge that required such a finding. We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of Section 1341.' (*McNally,* supra at 302, 303." (Emphasis added).**

It is worthwhile to note that the trial judge in *McNally* denied a jury instruction that would have required the jury to find that the government had proven a loss of money or property by the citizens flowing from petitioners' "scheme to defraud." This legal point is discussed at length hereinbelow quoting from *United States v. Mandel*, 672 F. Supp. 864 (D.Md. 1987) which gives a good history of post-*McNally* cases on this issue.

In the instant case, the *McNally* error was even more outrageous and at odds with this Court's decision since the jury was instructed that "The success or failure of the scheme in immaterial."

After *McNally*, this Court decided *Carpenter v. United States*, 108 S. Ct. 316 (1987) and reaffirmed it's holding that obtaining money or property from an alleged victim is "a necessary element of the crime under our decision last Term in *McNally v. United States* . . ." (*Carpenter* supra at p. 5).

This Court affirmed Carpenter's conviction only after it found that an employee of the Wall Street Journal engaged in a scheme that deprived the paper of its acknowledged property rights in confidential information produced in the regular course of its business, an act that the Court analogized to embezzlement. (*Carpenter*, supra at page 7, 8).

This aspect of *McNally* is further supported by two post-*McNally* cases considered by the Court. See *Holzer v. United States*, 108 S.Ct. 53, 98 L.Ed.2d 18 (1987); *McMahan v. United States*, ____ 107 S.Ct. 3254, 97 L.Ed.2d 754 (1987). Both *Holzer* and *McMahan* involved fiduciaries who accepted illicit payments in violation of their duties and who were convicted of mail fraud. See *United States v. Holzer*, 816, F.2d 304, (7th Cir.), vacated, ____ U.S. ____, 108 S.Ct. 53, 98 L.Ed.2d 18 (1987); *United States v. Price*, 788 F.2d 234 (4th Cir. 1986), vacated sub nom. *McMahan v. United States*, ____ U.S. ____, 107 S.Ct. 3254, 97 L.Ed.2d (1987). In each case, the Supreme Court vacated in light of *McNally* since the profit to the defendants was not at the principal's expense.

II

IN HOLDING THAT A FORMER DEPUTY ATTORNEY GENERAL CHARGED WITH MISCONDUCT IN OFFICE COULD BE CONVICTED OF MAIL FRAUD WHERE THE JURY IS INSTRUCTED THAT FINANCIAL HARM IS *IRRELEVANT*, THE NINTH CIRCUIT HAS PLACED ITSELF AT ODDS WITH THE OTHER CIRCUIT COURTS; A DECISION OF THIS COURT IS NECESSARY TO SECURE OR MAINTAIN A UNIFORMITY OF DECISIONS

First Circuit

In *United States v. Ochs*, (First Circuit 1988) 842 F.2d 515, the court reversed the conviction because the Government's theory of liability was embodied in Government's Requested Instruction No. 8 which read: "SCHEME NEED NOT FINANCIALLY HARM THE CITY OF BOSTON." (Caps by Court). *U.S. v. Ochs, at 524.* The court went on to hold:

> "It is difficult to conceive of an instruction more at odds with *McNally*." Id. at 525.
>
> "The effect of the instruction, which repeated twice the idea it was not necessary to find harm, was two-fold: the jury was told that the central element of mail fraud identified in *McNally* was irrelevant, and the jury was told that it was possible, in the evidence before them, to convict even if there was no financial harm. Under these circumstances, we are unwilling to engage in speculation about whether, despite the instruction, the jury actually found some financial harm." Id at 525.

Second Circuit

In *United States v. Covino*, 837 F.2d 65 (2nd Cir 1988) the court reversed Covino's conviction on the basis of *McNally*, holding that the Supreme Court in *McNally* "held that mail fraud requires a finding that the victim be defrauded of money or property." The court went on to state that neither the indictment or charge in the case alleged nor asked the jury to find that the

alleged victims were defrauded of money or property. (*U.S. v. Covino*, supra at 71.)

See *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987) (pre-*McNally*) for the legal reasoning that "If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property."

Also see *United States v. Baren*, 305 F.2d, 527 (2nd Cir. 1964) at page 528 where the Second Circuit held: "In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and *some person or persons must have been defrauded.*" (Emphasis added).

Fourth Circuit

In *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), the court reversed Mandel's conviction because,

> "The court, at the government's urging, specifically rejected an instruction offered by the petitioners requiring for conviction a finding that the State was defrauded of some money or property interest.
>
> "Thus, the jury instructions were insufficient and the convictions for mail fraud cannot be upheld under *McNally* standards. Nor may the convictions for racketeering be upheld." Id at 1074.

Accord: *United States v. Price*, 857 F.2d 234 (4th Cir. 1988); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988); *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Gordon*, 836 F.2d 1312 (11th Cir. 1988); *Johnson v. Colgate*, 687 F.Supp. 575 (M.D. Fla. 1988).

Fifth Circuit

In *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) the court reversed a wire fraud conviction since:

> "The section 1343 wire fraud convictions here did not require a jury finding that Faul and Herron defrauded the United States out of money or property." Id at 58.

The *Herron* court then went on to distinguish the difference in the term "defraud" as it appears in its broader meaning and as it is used in a more restricted sense in section 1341 and 1343 due to the different legislative considerations as described in *McNally*. The Ninth Circuit in the instant case failed to make this distinction.

Sixth Circuit

In *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989) the court reversed a 1341 conviction under *McNally* because the defendant was not charged with "wronging one in his property rights by dishonest methods or schemes" and held:

> "(I)n *McNally* the Supreme Court specifically rejected the notion that the concept of "defrauding" or "obtaining money by false pretenses," although phrased in the disjunctive, represented two different types of charges." Id. at 490.

In *United States v. Rabinowitz*, 327 F.2d 62 (6th Cir. 1964), (pre-*McNally*) the court held that,

> "In every mail fraud case there must be a scheme to defraud, representations known by defendants to be false and some person **or persons must have been defrauded.**" Id. at 76.

The Ninth Circuit relies upon *Erwin v. United States*, 242 F.2d 336 (6th Cir. 1957) in it's Opinion. Not only was *Erwin* overruled by *Rabinowitz*, but the Sixth Circuit's opinion in *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), requiring no jury instruction on actual loss of money or property was overruled by this Court in *McNally*. See *United States v. Covino*, supra at p. 41 for a detailed analysis.

Seventh Circuit

In *Magnuson v. United States*, 861 F.2d 166 (7th Cir. 1988), the court reversed the mail fraud conviction because neither the indictment nor the jury instructions could pass *McNally* muster. The court held:

> "A mail fraud conviction may not stand if the "jury was not required to find that the scheme **resulted in the government being deprived of money or property.**" *United States v.*

Gimbel, 830 F.2d 621, 627 (7th Cir. 1987) (footnote omitted)."

"Given these instructions, it is wholly unrealistic to believe that the jury either found or was required to find a deprivation of money or property before rendering guilty verdicts." Id. at 168.

Pre-McNally demise of Jury Instruction 27 F.R.D. page 152

The historical development and demise of the above instruction which was given in the instant case was studied and recited at length in *United States v. Brunet,* 227 F. Supp. 766, 771-772 (W.D. Wisconsin 1964) as follows:

"Defendant Gross alleges further that it is a requisite of an indictment to charge a person with **having successfully defrauded; that the mere attempt to defraud is not enough.** He cites U.S. v. Baren, 2 Cir., 305 F.2d 527, which does state on page 528L:

"In every mail fraud case, there must be a scheme to defraud representations known by defendants to be false and some person **or persons must have been defrauded."**

"In *United States v. Rabinowitz,* 6 Cir., 327 F.2d 62, at page 76, decided January 22, 1964, the court cites the Baren case and says as follows:

"This was the Government's case. In every mail fraud case there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded."

"There are cases which hold that it need not be shown that someone suffered a loss. Indeed, the Standard Instruction in 27 F.R.D. page 152 Section 21.09, reads as follows:

"The gist of the offense charged in the indictment is the willful use of the mails in carrying out, or attempting to carry out, a scheme to defraud as charged, and not the scheme itself. So the success or failure of the scheme is immaterial. (See . . . *Marshall v. United States,* 9th Cir. 1944, 146 F.2d 618, 620 . . ."

> "However, the court believes that inasmuch as the *Baren* and *Rabinowitz* cases supra, are so recent, it is inclined to follow them in this and future cases. **The court will instruct the jury that some person or persons must be defrauded."** Id. at 772.

Other post-McNally decisions

In *Ingber v. Enzor*, (S.D.N.Y. 1987) 664 F. Supp. 814, the court after reviewing the final steps of the Ninth, Fourth, and Second Circuits down the "slippery slope to extend the wide mouthed purse seine of 'mail fraud' " the court reversed Ingber's conviction under *McNally* because "this conduct is not within the reach of Section 1341 because it did not deprive any entity of anything tangible." Id. at 820. The court went on to hold that *McNally* should be given full retroactivity since the "Supreme Court in *McNally* did not state a rule of criminal procedure; rather it invalidated a specific unauthorized judicial expansion of the statutory criminal law"—citing *Robinson v. Neil*, 409 U.S. 505, 98 S.Ct. 876 and *Griffith v. Kentucky*, 197 S.Ct. 708.

In *United States v. Mandel*, 672 F.Supp. 864 (D.Md. 1987), the court held:

> "The charge given here did not require for conviction that the United States prove that the citizens of Maryland or its public officials suffered any economic loss or injury as a result of petitioners' conduct. Indeed, Judge Taylor declined to give a requested instruction that would have required that the Government prove loss of money or property by the citizens **flowing from petitioner's "scheme to defraud,"** just as the trial judge in *McNally* had denied such an instruction."

> "(T)he instructions as a whole permitted mail fraud convictions to be entered without a finding that any person was deprived of a property right." Id. at 875, footnote 8.

> "The result, then, is that writs of error **corum nobis** will be issued separately, vacating all of petitioners' convictions." Id. at 878.

III

THE MAIL AND FRAUD IN INTERSTATE TRAVEL STATUTES SHOULD BE CONSTRUED IDENTICALLY AND THE CONVICTIONS REVERSED

In *United States v. Covino*, 837 F.2d 65 (2nd Cir. 1988), the court held that **"mail fraud requires a finding that the victim be defrauded of money or property."** The court then agreed with Covino's contention that "because the wire fraud and mail fraud statutes are construed identically, *McNally* requires that his conviction be reversed". Id. at 71.

The indictment and charges under Sections 1341 and 2314 in the instant case neither alleged nor asked the jury to find that any alleged victim was defrauded of money or property. Each of the substantive mail fraud counts and each of the fraud in interstate travel counts alleged that petitioner "attempted to do so". (ER, Exhibit 3, Indictment, pages 4, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25—Counts 1 through 11).

The jury instructions did not require the jury to find that anyone had been deprived of a property right or lost any money or property. (See Appx. D). The scheemer counts (Count 1 through 10) alleged that petitioner "*attempted* to devise a scheme and artifice to defraud.". Each of the scheemer counts was adopted by reference into the substantive counts. The Government's theory of the entire case that "THERE DOESN'T HAVE TO BE A FINANCIAL LOSS TO BE A FRAUD" was adopted early in the proceedings by the trial court and applied equally well to both the 1341 and 2314 charges. (RT 17-2813, lines 15-17).

Nothing could have been more at odds with *McNally*. Both the indictment and the jury instructions were defective and permitted the jury to find petitioner guilty of charges outside both the mail and interstate travel fraud statutes. As the court in *United States v. Brunet*, 227 F.Supp. 766 stated: "The mere attempt to defraud is not enough." Id. at 771.

Petitioner submits that the more "narrow meaning" of the term "to defraud" as interpreted in *McNally* applies equally to 18 U.S.C. Section 2314 as it does to 18 U.S.C. Section 1341. The

legislative considerations behind passage of 18 U.S.C. Section 2314 and 1341 were the same. "To defraud" as used in 1341 and 2314 require that the Government allege and the jury find that some person suffered a money or property loss. Cf. *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) at page 58. In fact, the Government was required to allege and the jury was required to find that some person suffered a loss of at least $5,000.00 before there could be a conviction under Section 2341.

This issue was raised in the court below but was not addressed by the Ninth Circuit in it's Opinion.

Ex Post Facto Application of Section 1346

In footnote No. 2 of the Ninth Circuit Opinion (Appx. page 6), the Appeals Court notes that Congress in November 1988 added Section 1346, which, they speculate, overrules *McNally*, in that the new section broadens the term 'scheme or artifice to defraud' to include a scheme or artifice to deprive another of the intangible right of honest services. The Ninth Circuit then seems to suggest that this Court should decide whether or not Section 1346 applies retroactively. Petitioner submits that such an application would indeed be a violation of his Constitutional Rights under Art. I, Section 10. See *Beazell v. Ohio*, 269 U.S. 167 (1925), where Justice Stone summarized for the Court the characteristics of an ex post facto law:

> "Any statute which punishes as a crime an act previously committed which was innocent when done . . . ". Id. at 169-170.

Under *McNally*, the acts which petitioner stands convicted of were innocent when done and outside both the mail fraud and travel fraud statutes at the time.

CONCLUSION

In consideration of the law as recently interpreted by the United States Supreme Court and of the trial court's instructions in this case, the mail fraud and travel fraud convictions cannot stand. The trial court instructions, which stated that the jury could find petitioner guilty without finding that petitioner defrauded anyone of money or tangible property, constitute prejudical error after *McNally*. See *United States v. Price*, 857 F.2d 234 (4th Cir. 1988) at page 236.

The indictment was totally defective as to all counts in that it "did not charge that the scheme deprived" anyone of money or property. See *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) at page 626.[2]

For the reasons stated above, the Petition for Certiorari should be granted and the convictions reversed.

Dated: May 30, 1989.

Respectfully submitted,

JEROME C. UTZ
Counsel Pro Se

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[2] Petitioner does not waive the other constitutional issues raised below: Secretly giving the jury a copy of the original unexpurgated indictment; secretly giving each juror a copy of an altered indictment which was not shown to petitioner and which has now been lost by the court; personal contact with the jury during it's deliberations by a trial judge who had been removed from the case because of illness; personal contact with the jury by the government during jury deliberations; and improper denial of an evidentiary hearing on these issues.

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JEROME C. UTZ, *Defendant-Appellant.*	No. 88-1713 D.C. No. CV-87-5649-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
January 13, 1989—San Francisco, California

Filed September 27, 1989

Before: James R. Browning, Robert R. Beezer and Alex Kozinski, Circuit Judges.

Per Curiam

SUMMARY

Criminal Law

Affirming the district court's denial of a petition for collateral relief under 28 U.S.C. § 2255, the court held that the offense of mail fraud does not require that the victim actually be deprived of money or property, but only that defendant intended to defraud the victim of same.

Appellant James Utz appealed the denial of his second petition for collateral relief under section 2255 in which he contended that his conviction runs afoul of the Supreme Court's narrow interpretation of the federal mail fraud statute in *McNally v. United States*, 483 U.S. 350 (1987).

[1] According to Utz's reading of *McNally*, a scheme to defraud must succeed before it can form the basis of a mail fraud prosecution. [2] Contrary to Utz's argument, *McNally* added no new element to the offense. It merely limited the first element to schemes to defraud another of money or property. It is enough after *McNally*, as before, that the government charge and the jury find either that the victim was actually deprived of money or property or that the defendant intended to deprive the victim of same.

COUNSEL

Jerome C. Utz, pro se, Orinda, California, for the defendant-appellant.

Vincent C. Gambale, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

PER CURIAM:

Jerome C. Utz appeals the denial of his second petition for collateral relief under 28 U.S.C. § 2255, in which he contends that his conviction runs afoul of the Supreme Court's narrow interpretation of the federal mail fraud statute in *McNally v. United States*, 483 U.S. 350 (1987). Utz also appeals the district court's denial of an evidentiary hearing on his claim that prosecutorial conduct tainted the jury's deliberations. We affirm.

I.

Utz, a former deputy attorney general for the state of California, was indicted in 1983 for violations of the federal mail fraud statute, 18 U.S.C. § 1341, and of the Travel Act, 18 U.S.C. § 2314. The indictment charged Utz and three codefendants with a scheme to solicit investments in a fraudulent real estate development in Placerville, California. The district court granted defendants' motion to strike several unproven allegations in the indictment. The jury convicted Utz on the mail fraud counts. Utz and his codefendants appealed and we affirmed. *United States v. Wellington*, 754 F.2d 1457 (9th Cir. 1985).

Utz subsequently sought relief under 28 U.S.C. § 2255, alleging the prosecution improperly submitted the original, and therefore incorrect, indictment to the jury for consideration during its deliberations. The district court rejected Utz's section 2255 petition, and we affirmed. *United States v. Utz*, No. 86-1345 (9th Cir. Apr. 30, 1987) (unpublished mem.) (*Utz I*).

Two months later, the Supreme Court in *McNally* limited the scope of the mail fraud statute to protection of property rights. *See* 483 U.S. at 356-61.[1] Utz filed this second section 2255 petition based primarily on *McNally*, but also reasserting his allegation of misconduct regarding the indictment, arguing that the prosecution improperly submitted the unaltered indictment to the jury. The district court rejected both claims.

II.

[1] Utz argues that under *McNally* there must be evidence

[1] *McNally* is "fully retroactive," *United States v. Mitchell*, 867 F.2d 1232, 1233 (9th Cir. 1989) (per curiam), and therefore Utz's pre-*McNally* conviction must conform to it.

that the intended victims suffered actual property loss, evidence which, Utz claims, was lacking in this case. According to Utz's reading of *McNally*, a scheme to defraud must succeed before it can form the basis of a mail fraud prosecution.

Prior to *McNally*, it was well settled that to establish a violation of the mail fraud statute "the government was not required to prove that the scheme succeeded." *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960). "[U]nder the statute . . . it was immaterial whether the defendant obtained any money or not, since the mere devising of a scheme for obtaining money or property by fraud and the use of the mail for the purpose of executing such scheme constitutes a violation of the statute." *Erwin v. United States*, 242 F.2d 336, 337 (6th Cir. 1957).

We finding nothing in *McNally* to upset this longstanding interpretation of the statute. *McNally* stands for three propositions: that the scope of section 1341 is to be discerned from the statute's language and legislative history, *see McNally*, 483 U.S. at 356, 359-60; that the language and the legislative history indicate the statute was intended only "to protect the people from schemes to deprive them of their money or property," *id.* at 356, and thus does not protect citizens' intangible right to good government, *id.* at 360; and, finally, that the phrase "any scheme or artifice to defraud" in the statute "is to be interpreted broadly insofar as property rights are concerned." *Id.* at 356.

The words of the statute are inconsistent with Utz's theory. The statute provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to

be used], shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1341. The phrase "having devised *or intending to devise any scheme* or artifice to defraud" is plainly at odds with the notion that only actual deprivation of money or property is punishable. "The language [of the statute] is to be construed in light of the statute's manifest purpose to prohibit all attempts to defraud by any form of misrepresentation." *United States v. McNeive*, 536 F.2d 1245, 1247 (8th Cir. 1976).

The opinion in *McNally* is also inconsistent with Utz's view. The Court explained in *McNally* that the modern mail fraud statute is a codification of the Supreme Court's holding in *Durland v. United States*, 161 U.S. 306 (1896) and quoted with approval language from the *Durland* opinion broadly construing the predecessor to section 1341 "to 'includ[e] everything *designed to defraud* by representations as to the past or present, or suggestions and promises as to the future,' " *McNally*, 483 U.S. at 357 (quoting *Durland*, 161 U.S. at 313) (emphasis added), and stating that " '[i]t was with the purpose of protecting the public against all such intentional *efforts* to despoil . . . that this statute was passed. . . .' " *Id.* (quoting *Durland*, 161 U.S. at 314). *McNally* quotes *Durland* to support its conclusion that the statute "is to be interpreted broadly insofar as property rights are concerned." *Id.* at 356.

The Court reiterated this broad reading of the statute in *Carpenter v. United States*, 108 S. Ct. 316, 321 (1987), stating that "[s]ection[ ] 1341 . . . reach[es] *any scheme* to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." (Emphasis added.) It is enough, the Court said, that "the object of the scheme" was to deprive the victims of money or some cognizable property right, if that theory is charged in the indictment and presented to the jury. *Id.* at 320.

[2] After *McNally* the basic elements of the offense of mail fraud remain as they were before *McNally*: "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira v. United States*, 347 U.S. 1, 8 (1954); *see United States v. Dowling*, 739 F.2d 1445, 1448 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 207 (1985). Contrary to Utz's argument, *McNally* added no new element to the offense; it merely limited the first element to schemes to defraud another of money or property. It is enough after *McNally*, as before, that the government charge and the jury find either that the victim was actually deprived of money or property *or* that the defendant intended to defraud the victim of the same. A scheme to defraud, whether successful or not, remains within the purview of section 1341 as long as the jury was required to find an "intent to obtain money or property from the victim of the deceit." *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1989).[2]

III.

The district court did not err in denying Utz an evidentiary hearing on his allegation that a copy of the original, unexpurgated indictment was erroneously submitted to the jury for consideration during deliberations, a claim Utz raised, and we rejected, in his first section 2255 petition. *See Utz I*, No. 86-1345, at 2 (finding "not a scrap of evidence" to support this claim).

[2]In November 1988, Congress added a new section to chapter 63 of title 18 of the United States Code, § 1346, which overrules *McNally*, stating: "For the purpose of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4508. Because we affirm Utz's conviction even under *McNally*, we do not address whether § 1346 applies retroactively or whether retroactive application of this section would violate the *ex post facto* clause of the U.S. Constitution, Art. I, § 10. *See Dewey v. Coleman*, 874 F.2d 1280, 1286 (9th Cir. 1989) (en banc).

The record conclusively establishes that the correct version of the indictment was read to the jury, *see United States v. Utz*, No. CR-82-0629-TEH, at 3 (N.D. Cal. Oct. 14, 1986) (unpublished order), *aff'd, Utz I*, No. 86-1345, at 2, and that the information ordered stricken by the district court was in fact crossed out on the copy of the original indictment Utz claims was sent into the jury room. *See* 14 C.R. Doc. 623m, Exh. 10(c), at 13-15. Moreover, the district court expressly instructed the jury that the indictment "is not evidence of any kind" and "does not create any presumption or permit any inference of guilt." 9 C.R. at 6. Under these circumstances, even assuming a copy of the original indictment was erroneously submitted to the jury and, further assuming, as Utz argues, the error was of constitutional dimensions, we are satisfied beyond a reasonable doubt that it did not contribute to the verdict against Utz, and the verdict may stand. *See Satterwhite v. Texas*, 108 S. Ct. 1792, 1797 (1988).[3]

[3]In the response to Utz's claim, the district judge stated he "personally went into the jury room and verified that the jury had the correct version of the indictment." *United States v. Utz*, No. CR-82-0629-TEH, at 2 (N.D. Cal. Feb. 5, 1988) (unpublished order). Utz claims this action by the district court raises questions of judicial misconduct and juror impartiality. "Because this claim was not raised before the district court, we decline to hear it for the first time on appeal." *Smith v. United States Parole Comm'n*, 875 F.2d 1361, 1369 (9th Cir. 1989).

Utz also asserts that the government's attorney, in oral argument before this court in Utz's first section 2255 petition, conceded that he took the indictment out of the jury room, altered the indictment and then resubmitted the indictment to the jury. No tape of that oral argument survives. However, the alleged concession by the government appears to amount to nothing more than the same acknowledgment the government made before this court on Utz's second petition — *i.e.*, that, upon order of the court, the government retyped the indictment and returned it absent the stricken portions. There is absolutely no evidence in the record to indicate the government's attorneys communicated with, or in any other way "tampered" with, the jury, *see Remmer v. United States*, 350 U.S. 377, 379 (1956), nor is there any evidence that any alleged prosecutorial misconduct prejudiced the jury against Utz. *See United States v. Spawr Optical Research Inc.*, 864 F.2d 1467, 1471-72 (9th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3797 (U.S. Apr. 21, 1989) (No. 88-1708).

Also meritless is Utz's claim that the court violated due process and equal protection by giving each juror a copy of the indictment to consider during deliberations. We perceive no reason why the district court's decision to give each juror a copy of the indictment should not be accorded the same deference due a decision of the district court to send a single copy of the indictment to the jury room, *see Shayne v. United States*, 255 F.2d 739, 743 (9th Cir. 1958); *C.I.T. Corp. v. United States*, 150 F.2d 85, 91 (9th Cir. 1945); *see also United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974); *United States v. Murray*, 492 F.2d 178, 193 (9th Cir. 1973), especially, where, as here, the court cautions the jury not to consider the indictment as evidence. *See United States v. Steed*, 465 F.2d 1310, 1316 (9th Cir. 1972).

AFFIRMED.

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Appendix B

For Publication

Filed
March 23, 1990

United States Court of Appeals
For the Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Jerome C. Utz,
Defendant-Appellant.

No. 88-1713

Order

BEFORE: BROWNING, BEEZER and KOZINSKI, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

18 U. S. C. 1341

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 2314

2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

. . .

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more. . . .

Appendix D

30-4712

THE GIST OF THE OFFENSE CHARGED IN THE INDICTMENT IS THE WILLFUL MISUSE OF THE MAILS IN CARRYING OUT, OR ATTEMPTING TO CARRY OUT, A SCHEME TO DEFRAUD AS CHARGED, AND NOT THE SCHEME ITSELF. **SO, THE SUCCESS OR FAILURE OF THE SCHEME IS IMMATERIAL.**

30-4716

THE INTERSTATE TRAVEL TO DEFRAUD STATUTE CONTAINS NO REQUIREMENT OF SPECIFIC INTENT TO DEFRAUD A CHOSEN INDIVIDUAL BUT REQUIRES ONLY A GENERAL INTENT TO DEFRAUD ANY INDIVIDUAL WHO HAPPENS TO TRAVEL IN FURTHERANCE OF THE SCHEME.